# Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-64–10 OF 2011(W) AND THREE OTHER APPEALS
ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, SURIYADI, AHMAD MAAROP AND ZALEHA ZAHARI FCJJ
13 MARCH 2013

*Company Law — Winding up — Suit against company — Removal of directors — Registered office and place of business changed — Claims made without consent of liquidator or leave of court and without knowledge of directors — Appellants had separately transacted and bought lands from directors — No record of winding up order being lodged — Whether appellants duly registered as legal and beneficial owners of land — Whether company in liquidation still have registered interest in land — Companies Act 1965 s 223*

There were four appeals in the present case, in respect of four related appeals based on common issues. Briefly the facts were that the respondent company was wound up and subsequently, the respondent claimed that the register of members, directors and company secretary were amended to have a new set of shareholders, directors and company secretary in place of the then existing shareholders, directors and company secretary. The respondent's registered office and place of business were also changed. The claims were alleged to have been made without the consent of the liquidator or leave of court and without the knowledge of the directors of the respondent. The appellants, Wong Wee Kheong and Ho Mei Ling (joint purchasers) and Kenneth Too Heng Khuen had separately transacted and bought their respective piece of land from the respondent and the full purchase price for the said lands was paid. Necessary searches conducted throughout the said transaction and registration of ownership of the said lands from the respondent to the appellants and the searches revealed that the said land was free from encumbrances, liens, charges, caveats and restriction in title. There was also no record of a winding-up order being lodged against the respondent and the appellants were dealing with the proper company directors. The appellants claimed that they were duly registered as the legal and beneficial owners of the said land. The respondent had filed different suits in order to recover the respective piece of land which had been registered in the name of the appellants. In the first suit ('the first suit'), the respondent filed an application against the Companies Commission of Malaysia and the purported bogus directors and shareholders of the company seeking for an order that the respondent's company records be rectified alleging that fraud and forgery of instruments on the part of the alleged bogus directors and shareholders and a declaration that all transactions made after the winding-up of the respondent be declared void. The application

was dismissed by the High Court. In the second suit ('the second suit'), the respondent filed another application not only against the purported bogus directors and shareholders but also against the appellants (Wong Wee Kheong and Ho Mei Ling) seeking to nullify the sale of the said land and to recover the said land from the appellants. Again, the application was dismissed by the High Court. In the third suit which was allowed, the respondent filed against the purported bogus directors and shareholders as well as against the appellant (Kenneth Too Heng Khuen) seeking similar relief prayed for in the second suit. Dissatisfied with the decisions of the High Court, the respondent appealed against the decision of the High Court in dismissing the first and second suit; the appellants' (Wong Wee Kheong and Ho Mei Ling) appeal against the decision of the High Court in dismissing the striking out application in the second suit and the appellant's (Kenneth Too Heng Khuen) appeal against the decision of the High Court in allowing the third suit. The respondent's appeal against the decision of the High Court in the first and second suit was allowed. However, the appellants' appeal against the decision of the High Court in dismissing the striking out application in the second and third suit was dismissed. In the present appeal, the issue that arose for the court's determination was whether a company in liquidation which had disposed of its land to a third party without the consent of the liquidator or order of court could be construed to still have a registered interest in that land which could defeat the registered interest of the third party who acquired the property in good faith for value and without notice.

**Held,** allowing the appeals with costs:

(1) Section 223 of Companies Act 1965 ('the Act') makes no mention as to time. To insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding-up order at the material time. The Act does not prescribe as to how the discretion under s 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order had been granted based on two broad considerations if the transaction(s) were beneficial to the general body of creditors; or if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned (see para 13).

(2) As far as the appellants as purchasers were concerned they were dealing with directors of the respondent company who were authorised to sign the relevant documents. It was also undisputed that there were no records of a winding-up order against the company at the Registrar of Companies and the Insolvency Department. Even if the proviso of s 340(3) of the National Land Code that once provided a shield to bona fide purchasers for value and without notice was to apply, this shield was no longer

applicable to the purchasers. It must be noted that the proviso under s 223 of the Act comes as an aid to the purchasers as long as they can prove they were bona fide purchasers with good and honest intention which was the case here (see para 21).

(3) All of the four appeals were allowed with costs here and at the Court of Appeal and at the High Court in favour of the appellants. The costs were to be paid by the liquidator of Daya Bersama Sdn Bhd. The sale and purchase agreement between Wong Wee Kheong and Ho Mei Ling and Daya Bersama Sdn Bhd must be validated under s 223 of the Act and that the sale and purchase agreement between Kenneth Too Heng Khuen and Daya Bersama Sdn Bhd be validated under s 223 of the Act (see para 23).

**[Bahasa Malaysia summary**

Dalam kes ini terdapat empat rayuan tentang empat rayuan berkaitan yang berdasarkan isu-isu sama. Secara ringkas fakta kes adalah bahawa responden syarikat telah digulungkan dan berikutan itu, responden mendakwa bahawa buku daftar ahli, pengarah dan setiausaha syarikat telah dipinda dengan set baru pemegang saham, pengarah dan setiausaha syarikat menggantikan pemegang saham, pengarah dan setiausaha syarikat yang telah sedia ada wujud. Pejabat berdaftar dan tempat perniagaan responden juga telah ditukar. Tuntutan-tuntutan itu dikatakan telah dibuat tanpa persetujuan penyelesai atau kebenaran mahkamah dan tanpa pengetahuan pengarah-pengarah responden. Perayu-perayu, Wong Wee Kheong dan Ho Mei Ling (pembeli bersama) dan Kenneth Too Heng Khuen telah melakukan transaksi berasingan dan membeli tanah mereka masing-masing daripada responden dan harga belian penuh untuk tanah-tanah tersebut telah dibayar. Carian yang perlu telah dilakukan sepanjang transaksi dan pendaftaran pemilikan tanah-tanah tersebut adalah bebas daripada bebanan, lien, gadaian, kaveat dan sekatan hak milik. Juga tiada rekod perintah penggulungan telah dibuat terhadap responden dan perayu-perayu berurusan dengan pengarah-pengarah syarikat sebenar. Perayu-perayu mendakwa mereka telah pun didaftarkan sebagai pemilik-pemilik sah dan benefisiari tanah tersebut. Responden telah memfailkan guaman berbeza bagi tujuan mendapat balik bidang tanah masing-masing yang telah pun didaftarkan atas nama perayu-perayu. Dalam guaman pertama ('guaman pertama'), responden telah memfailkan permohonan terhadap Suruhanjaya Syarikat Malaysia dan pengarah-pengarah dan pemegang-pemegang saham syarikat yang dikatakan palsu itu memohon perintah agar rekod-rekod syarikat responden diperbetulkan dengan mendakwa bahawa alat fraud dan pemalsuan di pihak pengarah-pengarah dan pemegang-pemegang saham yang dikatakan palsu itu dan deklarasi bahawa semua transaksi telah dibuat selepas penggulungan responden diisytiharkan tidak sah. Permohonan itu telah ditolak oleh Mahkamah Tinggi. Dalam guaman kedua ('guaman kedua'), responden telah memfailkan satu lagi permohonan bukan sahaja terhadap pengarah-pengarah dan

pemegang-pemegang saham yang dikatakan palsu itu tetapi juga terhadap perayu-perayu (Wong Wee Kheong dan Ho Mei Ling) dengan memohon untuk membatalkan jualan tanah tersebut dan untuk mendapat balik tanah tersebut daripada perayu-perayu. Sekali lagi, permohonan itu telah ditolak oleh Mahkamah Tinggi. Dalam guaman ketiga yang telah dibenarkan, responden telah memfailkan terhadap pengarah-pengarah dan pemegang saham yang dikatakan palsu itu dan juga terhadap perayu (Kenneth Too Heng Khuen) memohon relief sama yang dipohon dalam guaman kedua. Berasa tidak berpuas hati dengan keputusan Mahkamah Tinggi, responden telah merayu terhadap keputusan Mahkamah Tinggi yang menolak guaman pertama dan kedua; rayuan perayu-perayu (Wong Wee Kheong and Ho Mei Ling) terhadap keputusan Mahkamah Tinggi yang menolak permohonan pembatalan dalam guaman kedua dan rayuan perayu (Kenneth Too Heng Khuen) terhadap keputusan Mahkamah Tinggi dalam membenarkan guaman ketiga. Rayuan responden terhadap keputusan Mahkamah Tinggi dalam guaman pertama dan kedua telah dibenarkan. Bagaimanapun, rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi yang menolak permohonan pembatalan dalam guaman kedua dan ketiga telah ditolak. Dalam rayuan ini, isu yang timbul untuk ditentukan mahkamah adalah sama ada syarikat dalam pembubaran yang perlu menjual tanahnya kepada pihak ketiga tanpa persetujuan penyelesai atau perintah mahkamah boleh ditafsirkan sebagai masih mempunyai kepentingan berdaftar dalam tanah tersebut yang boleh mengalahkan kepentingan berdaftar pihak ketiga yang memperoleh hartanah itu dengan niat baik untuk nilai dan tanpa notis.

**Diputuskan,** membenarkan rayuan-rayuan dengan kos:

(1) Seksyen 223 Akta Syarikat 1965 ('Akta tersebut') tidak menyebut tentang masa. Untuk mendesak bahawa pembeli perlu memohon pengesahan selepas syarikat digulungkan, perlulah ada pengetahuan. Di sini pembeli-pembeli tiada pengetahuan langsung tentang perintah penggulungan pada masa matan. Akta tersebut tidak menetapkan bagaimana budi bicara di bawah s 223 Akta tersebut patut dilaksanakan. Walau bagaimanapun terdapat kes-kes perundangan yang telah menerapkan prinsip-prinsip yang melibatkan pengesahan transaksi-transaksi selepas penggulungan dimulakan, dan malah selepas perintah penggulungan diberikan berdasarkan dua pertimbangan meluas jika transaksi-transaksi mendatangkan manfaat kepada badan am pemiutang-pemiutang; atau jika ia adalah adil dan saksama untuk membenarkan transaksi-transaksi berkaitan niat baik dan jujur mereka yang berkenaan (lihat perenggan 13).

(2) Setakat mana perayu-perayu sebagai pembeli-pembeli adalah berkaitan mereka berurusan dengan pengarah-pengarah responden syarikat yang telah diberi kuasa untuk menandatangani dokumen-dokumen relevan. Juga tidak dipertikaikan bahawa tiada rekod tentang perintah

penggulungan terhadap syarikat tersebut di Pendaftar Syarikat dan Jabatan Insolvensi. Walaupun proviso s 340(3) Kanun Tanah Negara yang pernah memperuntukkan perlindungan kepada pembeli-pembeli bona fide untuk nilai dan tanpa notis adalah terpakai, perlindungan ini tidak lagi terpakai kepada pembeli-pembeli. Perlu ditekankan bahawa proviso di bawah s 223 Akta tersebut memberi bantuan kepada pembeli-pembeli selagi mereka boleh membuktikan mereka adalah pembeli-pembeli bona fide dengan niat yang baik dan jujur seperti mana dalam kes ini (lihat perenggan 21).

(3) Kesemua empat rayuan itu dibenarkan dengan kos di sini dan di Mahkamah Rayuan dan di Mahkamah Tinggi menyebelahi perayu-perayu. Kos-kos hendaklah dibayar oleh penyelesai Daya Bersama Sdn Bhd. Perjanjian jual beli antara Wong Wee Kheong dan Ho Mei Ling dan Daya Bersama Sdn Bhd hendaklah disahkan di bawah s 223 Akta tersebut dan bahawa perjanjian jual beli antara Kenneth Too Heng Khuen dan Daya Bersama Sdn Bhd disahkan di bawah s 223 Akta tersebut (lihat perenggan 23).]

**Notes**

For cases on suit against company, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1801–1802.

**Cases referred to**

*Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241, FC (refd)

*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

*Engtex Marketing Sdn Bhd v Zinma Housing Development Sdn Bhd & Anor* [2009] MLJU 891; [2009] 5 CLJ 759, HC (refd)

*KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201, SC (refd)

*Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, SC (refd)

*Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346; [1998] 3 CLJ 637, CA (refd)

*Seek Lai Neo & Anor v Cheng Chuan Development Sdn Bhd & Ors* [1994] MLJU 427; [1994] 4 CLJ 892, HC (refd)

*Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (not folld)

**Legislation referred to**

Companies Act 1965 ss 141(6), 223
National Land Code ss 8, 89, 340(1), (2)(b), (3), (4)(b)
Rules of the High Court 1980 O 18 r 19

**Appeal from**: Civil Appeal No W-02–699 of 2007 (Court of Appeal, Putrajaya)

*Tommy Thomas (Paul Ong, Gabriel Daniel and Sarah Ho Yixin with him) (Paul Ong & Associates) for the appellants.*
*Ranjit Singh (CK Yeoh with him) (Ranjit Singh & Yeoh) for the respondent.*

**Zulkefli CJ (Malaya) (delivering judgment of the court):**

INTRODUCTION

**[1]** There are four appeals before this court. They are in respect of the four related appeals by the appellants against the order of the Court of Appeal dated 2 July 2010 based on common issues. For the purpose of the argument of the said four appeals before us the parties have agreed to refer to the record of appeal filed under Civil Appeal No 02(f)-64–10 of 2011(W) and the decision in Appeal No 02(f)-64–10 of 2011(W) binds the parties in respect of the remaining three other appeals namely: Civil Appeal No 02(f)-65–10 of 2011(W), Civil Appeal No 02(f)-66–10 of 2011(W) and Civil Appeal No 02(f)-67–10 of 2011(W).

**[2]** Leave to appeal was granted by this court in respect of all four appeals on the following question:

> Whether a company in liquidation which has disposed of its land to a third party without the consent of the liquidator or order of court can be construed to still have a registered interest in that land which could defeat the registered interest of the third party who acquired the property in good faith for value and without notice.

BACKGROUND FACTS

**[3]** The background facts relating to these four appeals before us may be summarised as follows:

(a) the respondent company was wound up by an order of court dated 24 August 2000;

(b) subsequent to the winding up of the respondent, the respondent claimed that the register of members, directors and company secretary were amended to have a new set of shareholders, directors and company secretary in place of the then existing shareholders, directors and company secretary. The respondent's registered office and place of business were likewise changed;

(c) all the above claims were alleged to have been made without the consent of the liquidator or leave of court and the then directors of the respondent were likewise unaware of the same;

(d) from 9 October 2003–29 January 2004 the appellants, Wong Wee Kheong and Ho Mei Ling ('joint purchasers') and Kenneth Too Heng Khuen had separately transacted and bought their respective piece of land from the respondent to build their residential home thereon. The full purchase price for the said lands was paid to the respondent by the appellants, payments of which have been received and acknowledged;

(e) throughout the said transaction and registration of ownership of the said lands from the respondent to the appellants, necessary searches were conducted. The searches revealed that:

(i) the said land was free from encumbrances, liens, charges, caveats and restriction in title;

(ii) there was no record of a winding up order being lodged against the respondent; and

(iii) the appellants were dealing with the proper company directors at the relevant times.

(f) as at 3 March 2004 the appellants were duly registered as the legal and beneficial owners of the said land.

## PROCEEDINGS AT THE HIGH COURT

**[4]** At the High Court, the respondent had filed different suits in different courts in order to recover the respective piece of land which had been registered in the name of the appellants. The said suits are as follows:

(a) Suit No P5–24–81 of 2006 ('the first suit').
In this suit, the respondent filed an application against the Companies Commission of Malaysia and the purported 'bogus' directors and shareholders of the company seeking for an order that the respondent's company records be rectified alleging that fraud and forgery of instruments on the part of the alleged 'bogus' directors and shareholders and a declaration that all transactions made after the winding up of the respondent be declared void. The High Court dismissed the respondent's application, inter alia, on the following grounds:

(i) the action taken by the respondent is an abuse of the process of the court as the appellants were not made a party in the present suit, the appellants would be oppressed and their rights and interest over the said land will be jeopardised by any decision made in favour of the respondent without the appellants being accorded any opportunity to be heard;

(ii) being bona fide purchasers of the said land for value and without

notice of any defect to title or the winding up of the respondent, the appellants have acquired indefeasibility of title over the said land;

(iii) s 223 of the Companies Act 1965 does not apply to land matters as in the present action; and

(iv) there was a delay in filing the present application.

(b) Suit No S7–22–664 of 2006 ('the second suit').
In this suit, the respondent filed another application not only against the purported 'bogus' directors and shareholders but also against the appellants (Wong Wee Kheong and Ho Mei Ling) seeking to nullify the sale of the said land and to recover the said land from the appellants. Again, the High Court dismissed the respondent's application, inter alia, on the grounds of:

(i) multiplicity of proceedings as the respondent had filed another suit (Suit No D5–24–81 of 2006) for the same relief; and

(ii) the issues raised in the present action have been decided in Suit No D5–24–81 of 2006 and have now been res judicata.

In view of the High Court's decision in the second suit, the appellants then filed an application to strike out the respondent's second suit under O 18 r 19 of the Rules of the High Court 1980. The appellants' application was however dismissed by the High Court.

(c) Suit No S1–22–665 of 2006 ('the third suit').
This suit was also filed by the respondent against the purported 'bogus' directors and shareholders as well as against the appellant (Kenneth Too Heng Khuen) seeking similar relief prayed for in the second suit. This suit was heard before a different High Court judge who allowed the respondent's application after holding, inter alia, that by operation of s 223 of the Companies Act 1965, the transfer of the lands in issue to the appellants was void.

## PROCEEDINGS AT THE COURT OF APPEAL

**[5]** Dissatisfied with the decisions of the High Court, the following appeals were filed by the parties to the Court of Appeal:

(a) the respondent's appeal against the decision of the High Court in dismissing the first suit (Court of Appeal Civil Appeal No W-02–699 of 2007);

(b) the respondent's appeal against the decision of the High Court in dismissing the second suit (Court of Appeal Civil Appeal No W-02–1166 of 2007);

(c) the appellants' (Wong Wee Kheong and Ho Mei Ling) appeal against the decision of the High Court in dismissing the striking out application in the second suit (Court of Appeal Civil Appeal No W-02(IM)-252 of 2009); and

(d) the appellant's (Kenneth Too Heng Khuen) appeal against the decision of the High Court in allowing the third suit (Court of Appeal Civil Appeal No W-02–1059 of 2007).

All of the appeals by the appellants and the respondent were heard together and on 2 July 2010, the Court of Appeal made the following orders:

(a) the respondent's appeal against the decision of the High Court in the first suit was allowed and an order-in-terms of prayers (i) to (vi) in the said suit was granted;

(b) the respondent's appeal against the decision of the High Court in the second suit was allowed and an order-in-terms of prayers (i) to (iii) in the said suit was granted;

(c) the appellants' (Wong Wee Kheong and Ho Mei Ling) appeal against the decision of the High Court in dismissing the striking out application in the second suit was dismissed; and

(d) the appellant's (Kenneth Too Heng Khuen) appeal against the decision of the High Court in the third suit was dismissed and the order of the High Court affirmed.

**[6]** In its broad reasons, the Court of Appeal held, inter alia, as follows:

1 This is our unanimous decision.

2 We find upon being wound up a company can only dispose of its property through its liquidator. In this case the instrument of transfer was not signed by the liquidator but by persons who claimed to be directors of the wound up company.

3 It follows that the instrument that was signed was a void instrument and under s 340(2)(b) of the National Land Code the transfer is void.

4 Even if assuming the court has a discretion under s 223 of the Companies Act 1965 as in the case of *Seek Lai Neo & Anor v Cheng Chuan Development Sdn Bhd & 2 Ors* [1994] MLJU 427; [1994] 4 CLJ 892 to validate a transfer, we see no reason to do so in preference to the Purchasers given that the company has an indefeasibility as well in respect of its property which is earlier in time and even after the winding up the purchasers should not be treated in preference to the general body of creditors.

5 To do so would be deny the rights of the general body of creditors.

DECISION

**[7]** It is noted that the Court of Appeal had decided that once a company is wound up, only the liquidator can dispose of property of the company. Any instrument of transfer signed by any other person was void. Section 223 of the Companies Act 1965 ('the Act') provides as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall *unless the Court otherwise orders be void.* (Emphasis added.)

**[8]** Learned counsel for the respondent in support of the decision of the Court of Appeal amongst others submitted that under s 223 of the Act the transfers of the portions of the land in question after the presentation of the winding up petition of the respondent company were void. After the company has been wound up the board of directors of the company becomes functus officio. The liquidator displaced the directors and the control of the activities of the company was vested with the liquidator. No one except the liquidator can act for the company.

**[9]** It was the contention of the respondent in the present case that the instruments of transfer were executed by persons who claimed to be the directors of the respondent company. The instruments of transfer were not executed by the liquidator, that is the official receiver. Therefore, clearly such instruments were void.

**[10]** On the issue of indefeasibility of title, learned counsel for the respondent contended that the appellants cannot seek the protection of the proviso contained in s 340(3) of the National Land Code ('NLC'). Section 340(3) of the NLC provides as follows:

> Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

**[11]** In respect of the operation of s 340(2) and 340(3) of the NLC it was

submitted for the respondent that the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 had over turned *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 and laid down the law of indefeasibility of title to its proper perspective. The Federal Court therein held that under s 340 of the NLC deferred indefeasibility applies. As such an immediate transferee of any title or interest in land such as the appellants cannot take advantage of the proviso to s 340(3) of the NLC to avoid its title or interest from being impeached.

**[12]** With respect we could not agree with the above contention of the respondent. It is true that ordinarily since the respondent company had been wound up on 24 August 2000, a disposition of the company's property after the commencement of the winding up, which was on 31 May 2000 (filing of the petition) would be void. However based on the peculiar set of facts of the case, it is our considered view that the proviso in s 223 of the Act is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid.

**[13]** It is to be noted that s 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time. We are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. It is also noted that the Act does not prescribe as to how the discretion under s 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations:

(a) if the transaction(s) are beneficial to the general body of creditors; or

(b) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.

**[14]** The general rule in s 223 of the Act is that it does not shut out bona fide transactions. In *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Seah, SCJ made reference to a passage by Vaisey J in Re Steane's (Bournemouth) Ltd which states:

> that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.

The discretion is an unfettered one.

**[15]** In *Engtex Marketing Sdn Bhd v Zinma Housing Development Sdn Bhd & Anor* [2009] MLJU 891; [2009] 5 CLJ 759, the issue of whether disposition of the company's property after winding up without sanction of court arose. The court held that although s 223 of the Act would invalidate such transfers, with regard to the bona fide purchaser, the provision would not apply when there is no allegation of misrepresentation or fraud or collusion against the purchaser or that the purchaser acted in concert with the persons in the company to effect the disposition despite being aware that that person had no authority to do so.

**[16]** In the case of *Seek Lai Neo & Anor v Cheng Chuan Development Sdn Bhd & 2 Ors* [1994] MLJU 427; [1994] 4 CLJ 892, the plaintiff had entered into an agreement with the defendant to buy a piece of land. The purchase price was to be paid in instalments. The plaintiff paid some and defaulted the rest. The defendant repudiated the contract and sold the land to B. The defendant was wound up but nonetheless transferred the land to B. The plaintiff sued the defendant for specific performance. The issues that arose were whether the disposition to B was void and whether B was a bona fide purchaser. Siti Norma, J (as she then was) held that there was no allegation of misrepresentation or fraud against B nor did they act in concert with the defendant to effect the disposition while being aware that the defendant had no authority to do so. The plaintiff's cause of action would be against the defendant and not B. B obtained indefeasible title. Section 223 of the Act empowers the court to validate a transaction that otherwise would be void. It is to be noted that in this case there was no application to validate but the court declared it as such.

**[17]** Coming back to the present case on the facts it is noted that the advertisements and gazette in respect of the winding up proceedings were made some three years before the transaction. The records at the Insolvency Department and/or the registrar of companies would be a conclusive indicator of the company's status as provided in s 141(6) of the Act and s 8 of the NLC (see the cases of *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346; [1998] 3 CLJ 637 and *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201. It is undisputed that at the time the first and second transaction of the lands in question took place and were concluded, there was no record whatever that the company was wound up. An officer from the Insolvency Department, Asrul Nizam bin Abdullah affirmed an affidavit on 4 February 2005 confirming that, even as at that date, no winding up order had been lodged.

**[18]** As regards the winding up order it was only lodged with the Companies Commission of Malaysia ('CCM') on or about 16 January 2006 approximately six years after the winding up order was granted when Mr Lim Tian Huat, the liquidator of the company, took over from the director of insolvency, and two years after the first and second transaction of the lands were completed. There

is absolutely no allegation of fraud or collusion or even dishonesty against the purchasers. For all intent and purposes the first appellant, the second appellant and Kenneth Too Heng Khuen were bona fide purchasers for value without notice of any purported act by any other party to defraud the company. As far as the purchasers were concerned, they were dealing with the proper directors of the respondent company at the material time and have made full payment to the company.

**[19]** In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 the Federal Court decided that to be a bona fide purchaser one should have contracted in good faith for value, and that knowledge of an adverse claim is not fraud. The material time is the time of the transaction. We are of the view the purchasers here were entitled to rely on the conclusiveness of the register at the Companies Commission of Malaysia (CCM) in respect of the respondent company's officers pursuant to s 141(6) of the Act and the status of the company and to rely on the register at the land office in respect of the properties pursuant to s 89 of the NLC.

**[20]** The Court of Appeal in the present case found that priority should be given to the respondent company which had a registered interest first in time as opposed to the appellants as purchasers, despite the purchasers having obtained title subsequently. With respect we do not agree based on the factual circumstances of the case. On this point, with regard to competing equities, a registered interest always prevails over an equitable interest. The determination of priority should be at the current date. The purchasers were the registered owners at the time the Court of Appeal made its decision. The titles were still registered in their name. Their title in our view is indefeasible under s 340(1) of the NLC. The respondent company had relinquished their registered interest in the properties when the sale was concluded. It follows, that if the transactions are declared as valid under s 223 of the Act, then the instrument of transfer was not void or insufficient under s 340(2) of the NLC nor does the operation of law under s 340(4)(b) of the NLC defeat the interests of the purchasers.

**[21]** The Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* cited in support of the respondent's case in our view is of no utility to the factual matrix of this case. This is because in that case the registration of the appellant on the title was obtained by fraud or forgery and the appellant never charged the land to the bank. Furthermore, in that case, the appellant never granted any power of attorney ('PA') to the first respondent and the appellant had never authorised the first respondent to charge the land. In the present case, as far as the appellants as purchasers were concerned they were dealing with directors of the respondent company who were authorised to sign the relevant documents. It is

also undisputed that there were no records of a winding up order against the company at the Registrar of Companies and the Insolvency Department. Even if the proviso of s 340(3) of the NLC that once provided a shield to bona fide purchasers for value and without notice (*Boonsom Boonyanit*'s case) is to apply, this shield is no longer applicable to the purchasers by virtue of the *Tan Ying Hong*'s decision. It must be noted that the proviso under s 223 of the Act comes as an aid to the purchasers as long as they can prove they were bona fide purchasers with good and honest intention which is the case here (see the case of *Seek Lai Neo & Anor v Cheng Chuan Development Sdn Bhd & Ors*).

**[22]** For the respondent company it was argued that as far as they were concerned, the transfer of the property was done by 'bogus' directors who had taken over the company without the consent of the liquidator or the court, and as a result the transfers were secured by means of an insufficient or void instrument under s 340(2)(b) of the NLC. On this point learned counsel for the appellants was right in submitting that the allegations made by the company against the alleged perpetrators only presented a one-sided version as there was no evidence that the alleged perpetrators were even served with the cause papers and/or defended the action. Although apparently police reports had been lodged by the persons claiming to be the rightful directors, there is no evidence whatsoever of anyone being arrested, charged and/or convicted because of the fraud alleged by the liquidator. There is a serious doubt as to the authenticity of the police reports allegedly made as some do not bear any official report numbers or certification/stamp by the police department and/or not in the usual format of police reports lodged. Allegation of fraud cannot be determined by affidavit evidence. 'Fraud' within the meaning of NLC means 'actual fraud' and not 'constructive fraud or equitable fraud' (see the case of *Ong Ban Chai & Ors v Seah Siang Mong*). The exhibits adduced by the liquidator in an attempt to show that the company has been 'unlawfully snatched' away by some fraudsters are insufficient to prove fraud. These documents merely indicate who were the past and current officers of the company.

## CONCLUSION

**[23]** For the reasons abovestated we would answer the question posed in this appeal in the negative. All of the four appeals are allowed with costs here and at the Court of Appeal and at the High Court (in respect of Appeal No 02(f)-67–10 of 2011) in favour of the appellants. The costs are to be paid by the liquidator of Daya Bersama Sdn Bhd. We would also make the necessary order that the sale and purchase agreement dated 30 October 2003 between Wong Wee Kheong and Ho Mei Ling and Daya Bersama Sdn Bhd be validated under s 223 of the Companies Act 1965 and that the sale and purchase agreement dated 30 October 2003 between Kenneth Too Heng Khuen and Daya Bersama Sdn Bhd be validated under s 223 of the Act.

**[24]** We would also make an order that the endorsement of Daya Bersama Sdn Bhd as proprietor of the respective titles stated below (subsequent to the decision of the Court of Appeal) be cancelled and the said lands be restored to the appellants free from encumbrances, namely:

(a) GM 2926 Lot 35387 Sungai Serdang, Mukim Kuala Lumpur, Daerah Kuala Lumpur Wilayah Persekutuan in favour of Wong Wee Kheong and Ho Mei Ling; and

(b) GM 2927, Lot 35389, Mukim Kuala Lumpur, Daerah Kuala Lumpur Wilayah Persekutuan in favour of Kenneth Too Heng Khuen.

**[25]** A further order is made that the registrar's caveats on the lands above be cancelled forthwith and that the registrar of titles at the Land Office Wilayah Persekutuan do make the necessary memorials to reflect on all the orders made.

**[26]** We award costs of RM100,000 to the appellants here and the courts below. Deposit to be refunded to the appellants.

*Appeals allowed with costs.*

Reported by Afiq Mohamad Noor